Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS
CLERK

No. 82-363

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,

VS.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. ROSENFELD
COUNSEL OF RECORD
VICTOR J. VAN BOURG
VAN BOURG, ALLEN, WEINBERG
& ROGER
875 Battery Street
San Francisco, CA 94111
Telephone: (415) 864-4000
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6300
33

TABLE OF CONTENTS

Page

I

The District Court erroneously determined those contractual issues which were determinative of the arbitrability issue where the parties had exclusively reserved those issues for resolution through the grievance procedure 1

II

The Lucas Flour rule is not applicable unless there is a procedure for final and binding arbitration 5

III

The union's claim for wages and benefits different than that negotiated by the national parties was not subject to resolution through the grievance procedure 6

IV

The court below ignored a decision reached by the national grievance committee expressly interpreting the language of the collective bargaining agreement 7

V

Where the union has no contractual obligation, damages may not be imposed for picketing activity 8

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases

	Page
Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976)	8, 9
Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Freight Lines, 370 U.S. 711 (1962)	6
Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951 (3d Cir. 1975), cert. den., 424 U.S. 935 (1976)	9
General Drivers, Teamsters v. Ris & Co., 372 U.S. 517 (1973)	5
United Brotherhood of Carpenters v. Hensel Phelps Construction Co., 376 F.2d 731 (10th Cir. 1967), cert. den., 389 U.S. 952	5
Western Conference of Teamsters v. Ringsby Truck Lines, ... F.2d ..... (9th Cir. 1982)	8
W. R. Grace and Co. v. Rubber Workers, No. 81-1314 (cert. granted)	8

Statute

28 U.S.C., Section 1292(b)	3

Other Authorities

"The Role of Interest Arbitration in a Collective Bargaining System," 1 Indus. Rel. L.J. 427 (1976)	6

No. 82-363

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,

vs.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THE DISTRICT COURT ERRONEOUSLY DETERMINED THOSE CONTRACTUAL ISSUES WHICH WERE DETERMINATIVE OF THE ARBITRABILITY ISSUE WHERE THE PARTIES HAD EXCLUSIVELY RESERVED THOSE ISSUES FOR RESOLUTION THROUGH THE GRIEVANCE PROCEDURE

As we showed in our petition, there were at least four separate determinations which were made by the district court in rendering a decision that the trial should proceed to the exclusion of the contractual grievance procedure. (Petition, p. 8-11). The employers do not contest the proposition that the grievance procedure contained in the NMFA or the JC 7 Supp. is broad enough to encompass the contractual issues which the district court decided. For

example, the question of retroactivity of the 1970-1973 agreement was certainly a "grievance[] or question[] of interpretations arising under this Master Agreement or Supplemental Agreements . . ." (NMFA, Art. 8(a)) (or a dispute "affecting the mutual relations" of the Union as well as the employers under the JC 7 Supplement).

In various orders prior to the commencement of the trial, the district court held that exhaustion of the grievance procedure was not required, not because of the Union's repudiation of the agreement, but because the court did not read the collective bargaining agreements to require submission of these disputes to the grievance procedure. (App. D, p. 8-33; App. E, p. 1-7; App. F, p. 18-22; App. J, p. 1-4). Those same issues were actually tried to the court, raised in post-trial briefs and once again rejected by the district court. (App. C, p. 12-23).

The Respondents rely exclusively upon the decision of the court of appeals, which held that the Union was estopped from raising the contractual defense since it had "repudiated" the contract before the district court. This is not correct as to the issues which we have described above which were considered and rejected by the district court long before the trial began in 1975. Indeed, the district court rejected before the trial precisely the position adopted by the court of appeals:

> "Another problem that concerns the court is that the opinion in *Flair* takes no note of the point the court proceedings have reached when the arbitration question comes up. *Flair* itself was a suit to compel arbitration; the question did not, of course, come up. *Drake Bakeries* indicated that passage of time from the filing of the complaint in court might be the proper measure of whether the party demanding arbitration might be held to have waived that right; the circumstances of this case lead the court to conclude that it would be desirable to establish some rule about

> how long a party can preserve its right to shunt a matter to arbitration after a court begins to invest its time in the case. . . . The court feels that it should have at its disposal some device to minimize the disruptive potential of a demand for arbitration late in the judicial proceedings. Since no such rule seems presently to exist, the court could not refuse Local 70's demand for arbitration, but it does note that the delay in this case is not likely to disrupt the proceedings to the degree that would, in the court's opinion, justify denial of arbitration on that ground alone." App. D, p. 29-33.

We emphasize to this Court that the district court expressly rejected the proposition that Local 70's "demand for arbitration" was so late as to disrupt the proceedings or to estop the Union from raising such a defense! The district court then went on to consider the issue not only in that memorandum but in subsequent opinions as well as its opinion after the matter was tried.

Indeed, the district court expressed some vexation at the number of times which the Union raised this very issue. (See App. G, p. 1-5). Indeed, the Union sought certification under 28 U.S.C. Section 1292(b) for an interlocutory appeal, a certification which the district court rejected. *Id.*, p. 2.

Finally, when the court considered the Union's arguments after trial, it referred to "defendant's numerous motions to stay the proceedings pending exhaustion of the grievance procedures . . ." (App. C, p. 12).

When the Union's initial motion to stay or dismiss the proceedings was made, the district court considered the very question of whether the Union's conduct constituted a repudiation of the agreement so as to excuse the employer's exhaustion of the grievance procedures. The district court rejected that proposition not only because the Union

had raised the issue in a timely fashion but because the law required the question of repudiation to be determined by the arbitrator. (App. D, p. 21-29).

Nor as a factual matter did Local 70 repudiate any contractual obligation once the strike ended. The record before the district court in the trial was that once the strike ended the Union litigated its obligation to be bound to the 1970-1973 agreement before the Labor Board and the court of appeals. Yet, during that time it accepted the provisions of the contract, processed grievances under the contract and otherwise recognized its legal obligations.

Finally, we remind this Court that the district court in fact stayed all proceedings for claims arising on or after the date of May 18, 1970 because it found that the grievance procedure in existence after that date clearly encompassed any employer damage claims. Having done so, the district court expressly had to reject any claim that the Union's conduct so constituted a repudiation of the judicial process that any demand for arbitration was waived.

We, thus, return to the original proposition which the employers in their response have ignored: In determining that the employers' claims were not subject to the grievance procedure, even though the grievance procedure on its face encompasses those claims, the district court erroneously determined issues of contractual interpretation so as to avoid the grievance procedure. The issue as we presented it in our petition is squarely placed to this Court: Where a court is faced with issues of contractual interpretation which determine the arbitrability of a dispute, should the court intrude upon the collective bargaining agreement by deciding those issues, or should the court either stay its hand or dismiss the proceedings so that the parties may have those issues determined by their chosen process of dispute resolution?

II

THE LUCAS FLOUR RULE IS NOT APPLICABLE UNLESS THERE IS A PROCEDURE FOR FINAL AND BINDING ARBITRATION

We agree with the employers in their response that the grievance procedure contained in the Joint Council No. 7 Supplement as well as in the National Master Freight Agreement has certain characteristics of arbitration. Moreover, we agree that it is the process by which the parties have chosen to resolve contractual disputes. Thus, the court below was correct in characterizing that procedure as one in the nature of arbitration.

Yet, however, that begs the precise question which we have posed to this Court. That procedure which the parties chose specifically precluded and specifically excluded final and binding arbitration by neutral party for the resolution of any dispute, with the exception of any claim involving the discharge of an employee where a supplemental agreement contains such a procedure. Having expressly rejected final and binding arbitration, the parties, however, recognize that it was well settled that should a joint labor-management committee reach a majority decision that decision would be fully enforceable, as if it were an award from a neutral arbitrator. That is the doctrine of *General Drivers, Teamsters v. Ris & Co.*, 372 U.S. 517 (1973). (App. A, p. 36-38).

In this case, however, where the parties exclude the possibility of final resolution through binding arbitration, does the *Lucas Flour* doctrine impose an obligation not to strike, absent the parties' expressed understanding that no strikes will occur until the grievance procedure has been exhausted.[1]

[1]The parties could, of course, agree that there would be no strike pending exhaustion of the grievance procedure and grant the right of the Union or the employer to take economic action after the grievance procedure was exhausted with no finality. See, e.g., *United Brotherhood of Carpenters v. Hensel Phelps Construction Co.*, 376 F.2d 731 (10th Cir. 1967), *cert. den.*, 389 U.S. 952.

There are important policy reasons for distinguishing between those grievance procedures which have finality and those which do not. Most importantly, the policy behind *Lucas Flour* which recognizes the *quid pro quo* is unavailing where the employer has not agreed upon final and binding arbitration to resolve disputes. Indeed, it must be contemplated by the parties that either side can take economic action to resolve contractual disputes where the parties can only agree upon a joint labor-management committee system which does not promise final resolution of any dispute.

Thus, the characterization by the court below of the grievance procedure process as one of "arbitration" does not answer the issue left open by this Court in *Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Freight Lines*, 370 U.S. 711 (1962).

III

THE UNION'S CLAIM FOR WAGES AND BENEFITS DIFFERENT THAN THAT NEGOTIATED BY THE NATIONAL PARTIES WAS NOT SUBJECT TO RESOLUTION THROUGH THE GRIEVANCE PROCEDURE

As we point out in our petition, where a union engages in economic action to force an employer to agree to terms and conditions of a contract, those issues are not resolved through the grievance procedure of a contract unless the parties have agreed to interest arbitration. (Petition, p. 16-18). The parties have not, of course, agreed to interest arbitration to resolve such contractual disputes. Cf. Morris, *"The Role of Interest Arbitration in a Collective Bargaining System,"* 1 Indus. Rel. L.J. 427 (1976).

In response to our petition, the Respondents assert that the question of whether Local 70 was bound to the agreement reached by any multi-employer/multi-union bargaining was subject to resolution through the grievance proce-

dure. (Response, p. 19-20). Yet, the employers do not respond to the other point which we make: Nothing suggests that the Union could grieve its claim for higher wages. If the employers earnestly made such a contention, they would then subject the resolution of any contractual demand during a bargaining session to the grievance procedure, something the parties specifically prohibited because they intended collective bargaining to resolve such issues, not through the process of a grievance procedure.

IV

THE COURT BELOW IGNORED A DECISION REACHED BY THE NATIONAL GRIEVANCE COMMITTEE EXPRESSLY INTERPRETING THE LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT

In our petition we point out that the district court interpreted a provision of the contract to prohibit strike, after the termination of the agreement, unless an impasse in negotiations had occurred between the parties. (Petition, p. 18-19).

As we pointed out, the National Grievance Committee, which is the final "arbiter" of any contractual interpretation issue, expressly ruled that either the employer or the Union was free "unilaterally to determine when economic recourse (strike or lockout) was necessary if no agreement had been reached on proposed revisions . . ." (App. H, p. 1-3).

The employers respond by saying that that interpretation has nothing to do with the issue here. That rejoinder is incorrect. The interpretation reflected in Appendix H was reached with respect to the 1973-1976 agreement, the language of which was precisely the same as was interpreted by the district court in this case.

That Grievance Committee award was brought to the attention of the Court of Appeals by way of a request that

the court take judicial notice of that decision. That was thought to be the appropriate process since the United States District Court for the Northern District of California had dismissed a similar action brought by a different employer relying precisely upon the same theory. That decision of the District Court was subsequently affirmed by the Ninth Circuit when it granted the request of various parties to dismiss the appeal lodged by certain employers from the dismissal. See *Western Conference of Teamsters v. Ringsby Truck Lines*, ... F.2d ..... (9th Cir. 1982).[2] Had the Ninth Circuit considered the *Ringsby* appeal, and confirmed the order of the District Court, then there would have been conflicting decisions within the same circuit with respect to the meaning of the contractual provisions in dispute in this case. This all emphasizes the issue which we have presented to this Court: Whether a court may ignore the settled interpretation of a collective bargaining agreement, which interpretation has been the result of a final and binding decision of a grievance committee. It is a point presently pending before this Court in *W. R. Grace and Co. v. Rubber Workers, No. 81-1314 (cert. granted)*.

V

WHERE THE UNION HAS NO CONTRACTUAL OBLIGATION, DAMAGES MAY NOT BE IMPOSED FOR PICKETING ACTIVITY

We have argued in our petition that a no-strike pledge may only run to those employees covered in the unit represented by a union. (Petition, p. 20-21). We, of course, concede that a union could give a far broader pledge: Not only not to strike, but also not to picket any other location nor even to respect a picket line established at any location of the employer. See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). In this case, however, there was no such no-strike pledge anywhere in

[2] The citation given in our petition at footnote 20 is now incorrect since the court has now modified its opinion. The substance, however, remains the same.

any collective bargaining agreement, except that which is to be implied under the *Lucas Flour* doctrine.

With this in mind, we have argued that the Union's picketing, something which we concede for purpose of this petition was caused by Local 70, at terminals outside of the Union's jurisdiction or which picketing had the effect of inducing employees in other bargaining units to respect, was not a violation of the collective bargaining agreement. We emphasize our point: The Union is not bound not to engage in picketing which has the effect of inducing employees who are not represented by it to cease working. Indeed, whether they choose to respect the picket lines is governed either by their collective bargaining agreement or by other provisions of the National Labor Relations Act.

We have suggested that the Ninth Circuit's approach to this problem is terribly inconsistent with the federal labor laws which provide that a union may engage in economic activity so long as it is neither given a no-picketing pledge in its collective bargaining agreement or there was not some other violation of the federal labor laws.

The employers are incorrect in their reading of *Eazor Express, Inc., v. International Brotherhood of Teamsters,* 520 F.2d 951 (3d Cir. 1975), *cert. den.,* 424 U.S. 935 (1976). The Union's picketing outside of its jurisdiction was not subject to contractual damages. *Id.* at 965. That is our point!

It is the policy question left open in *Buffalo Forge Co., supra,* with respect to the obligation of a union to respond in damages for such stranger picketing which is before this Court and of which we seek review.

CONCLUSION

We submit that substantial issues of federal law as well as labor relations policy are presented in the issues posed to this Court. For the reasons stated in our initial petition as well as in this response, the petition for writ of certiorari should be granted.

Dated: October 22, 1982

Respectfully submitted,

DAVID A. ROSENFELD
COUNSEL OF RECORD
VICTOR J. VAN BOURG
VAN BOURG, ALLEN, WEINBERG
& ROGER
Attorneys for Petitioner